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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Petitioners.

vs.

KATIE MAE ANDREWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 507 F.2d 611, and is reproduced in Appendix A of the Petition. (pp. 1A-14A) The opinion of the United States District Court for the Northern District of Mississippi is reported at 371 F.Supp. 27, and is reproduced in Appendix B of the Petition. (pp. 15A-37A)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 3, 1975. The petition for writ of certiorari was timely filed and was granted on October 6, 1975. This Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether a person has a right derived from or protected by the United States Constitution to bear illegitimate children.

2. Whether the failure to employ plaintiffs in defendants' school district because they were unwed parents of illegitimate children impinges upon some provision of the United States Constitution.

3. Whether a school district rule, neutral as to sex and race, which excludes parents of illegitimate children from consideration for employment as teachers or teacher aides in a small rural school district[1] violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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1. The Drew Municipal Separate School District is a small school district located in a rural Mississippi Delta town. The town of Drew has a population of 2,574 individuals according to the 1970 United States Census Report.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. §§1981, 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d), et seq., and the Fifth and Fourteenth Amendments to the Constitution of the United States. The plaintiffs, both being single and parents of illegitimate children, sought an injunction voiding the school district's rule which excluded unwed parents of illegitimate children, both male and female, from consideration for employment as teachers and teacher aides. The plaintiffs also requested the district court to require the defendants to enter into contracts of employment with them.[2] The district court found the regulation to be unconstitutional as violative of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States[3] and required the defendants to execute contracts of employment with the plaintiffs.

The rule was adopted based upon the judgment that the role of a teacher, apart from imparting instruction, is to mold character and development through being a "role model." (Pettey, Trans., pp. 7, 8) The rule was not promulgated to automatically deny consideration for employ-

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2. Both plaintiffs made application for employment with the defendant school district. Plaintiff Rogers indicated on her application that she was single and had one child. This child was illegitimate and she later gave birth to another illegitimate child. Plaintiff Andrews indicated on her application that she was single and had no children when in fact she had one illegitimate child. When questioned about this matter, she readily admitted that she "lied about it." Her attitude as to falsification of an employment application by anyone was, "If that's the only way they could get the job, by lying, sure." (Tr. pp. 65 & 67—March 20, 1973)

3. The district court held that no rational relation exists between the school district's rule and educational objectives and further that in the alternative the rule was a sex-based classification and therefore inherently suspect, but the court of appeals did not address this issue since it affirmed the district court "upon traditional equal protection grounds."

ment as teachers and teacher aides of unwed parents of illegitimate children on the basis that such parents are immoral, but on the basis that such parents regardless of their present status of morality are improper models for the many roles occupied by the teacher—"educator, adviser, friend and, at times, parent-substitute"—during the formative years of primary and secondary education. *Goss* v. *Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 [No. 73-898], decided January 22, 1975 (Powell, J., dissenting).

The rule is rested on educational considerations; the superintendent's testimony is clear that educational reasons were involved. (Id., pp. 7, 8)

The superintendent's testimony concerning morals has been overworked and misapprehended by the lower courts. The superintendent was not saying that the rule necessarily would separate the moral from the immoral in litmus paper fashion. Rather, his moral concern was that in the school year 1971-1972, twenty-eight girls ranging in age from thirteen to seventeen dropped out of school because of pregnancy. (Id., p. 8) He believed that the influences created by application of this rule would arrest this trend. Without insinuation that those who fell afoul of the rule were necessarily presently immoral, the superintendent believed that unwed parents of illegitimate children in teaching positions would add to rather than help arrest this alarming trend in his district. (Id., p. 9)

In this case of first impression, sociological and psychological testimony was preeminently important. The district court only paid lip service to the expert testimony, 371 F.Supp. 31, as being of a "judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions." Shunning these important opinions of experts, the court rested its decision primarily on *a priori* assumptions as to the invalidity of the classification

without considering how the classification works in practice. It is for this reason that the testimony of the experts, both pro and con, deserves considered attention.

Dr. Kenneth Clark while testifying for the plaintiffs opined that "in addition to [the] basic academic skills and competences a teacher ought to communicate to students, even from the early grades, the importances of other human characteristics." (Dep. Clark, p. 13) He conceded much importance to "role modeling", wherein growing individuals derive models for their own behavior, attitudes and feelings from adults and teachers. (Id., p. 15)[4] He readily admitted that teachers "do affect the values of young people who come in contact with them"; that "unwed parenthood [is] a component or part of role model" and "it may well be a factor in influencing the child". (Id., p. 16) He further admitted that "teachers not only communicate academic knowledge they communicate an approach toward human beings, a style of life". (Id., p. 17)

The Reverend John Perkins testifying for the plaintiffs stated that he was of the opinion that a teacher has great effect in a classroom over the moral development and character development of a child. It was his belief that the teacher serves as a model for the student. (Tr., p. 26—May 31, 1973)

Dr. Ernest van den Haag, scholar and writer in the fields of education, sociology and psychology, identified

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4. "* * * in the process of growing up human beings look to other human beings for what are considered desirable characteristics, and sometimes undesirable, and that adults, particularly significant adults in the life of every human being, become a model of what that particular individual will strive toward. * * * It means that the growing individual looks to adults, and sometimes peers, as a model for their own behavior and attitudes and feelings." (Id., p. 15)

and elaborated upon a basis for the rule of the Drew Municipal Separate School District. He testified that the family and monogamous marriage are protected American institutions. (Deposition of Dr. van den Haag, p. 8) Sexual activities are and have been regulated within the social and legal norm of marriage. It then follows, according to Dr. van den Haag, that those who do not conform to the institution of marriage "are legitimately made to suffer some disadvantages, particularly if they deliberately fail to follow that institution." (Id., p. 8)

Teachers, in van den Haag's view, perform two functions: (1) They teach cognitive knowledge to their students, and (2) "Transmit and, inseparably from this cognitive knowledge, the cultural heritage of the society or community in which they are employed." The cultural transmission role is particularly strong in the lower grades, since the primary influences on children are the home and the school. The emotional attitudes of the teacher are readily communicated to his students by the teacher's personality and conduct. The authority of the teacher turns on his acceptance by the pupil. The acceptance reaches the degree of receiving the teacher as a person wherein the students:

> "take as a model to some extent, and indentify with and, in fact, in effect, build their own identity on the teacher's general conduct, behavior, etc., to the extent to which they are aware of it." (Id., pp. 9-11)

The importance of proper role models is central to Dr. van den Haag since "students seem to have sources of information that I never have been able to fully find out, but they seem to always know everything about their teachers." (Id., p. 11) Because Drew is a small town with a small school, Dr. van den Haag believed that "whether

by gossip or information or general curiosity about the lives of adults, that the students would know" about the private lives of their teachers. (Id., p. 13) There is an accompanying danger, according to van den Haag, that children fond of a particular teacher would accept that teacher totally and therefore accept her behavior that the surrounding community regards as unacceptable. (Id., p. 14) Dr. van den Haag believes that even arithmetic teachers in grade school will tend to communicate with the children on an emotional basis about everyday events and occurrences even within their own family. (Id., p. 16) It will simply be unavoidable that the teacher would express his own values in the classroom[5]. Finally, van den Haag believes that education in the lower grades is not just a matter directed to the intellect:

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5. Teaching such subjects about, say, American history and social studies, family and, perhaps, today, I do not know whether this is the case in Drew, sexual education and education in family patterns. It is unavoidable, it seems to me, that the pupils will be curious about the teacher's own family life, past and present conduct, and it is unavoidable that the teacher, whether he likes it or not, expresses his own values in the classroom.

If the teacher feels it is all right to have illegitimate children or children out of wedlock, such a teacher can hardly, at the same time, pretend to the children in the classroom that it is wrong.

Clearly, the children would notice the inconsistency.

On the other hand, if the teacher feels it is wrong himself or herself, and yet has had children out of wedlock, I think it would be hard for the teacher to present himself to the classroom as a repentant sinner, who has done something that is wrong. So, in effect, the teacher would be compelled, I would say, to tell the children that it is all right to have children out of wedlock.

And that, of course, would have one of the two effects I mentioned before. If the children accept the teacher in general, they will accept his teaching. If, on the other hand, the teacher has been unacceptable for other reasons to the children, this behavior and this expression of values will make him even more unacceptable, to such a point as to compare his or her ability to teach the children anything.

(Dep. of van den Haag, pp. 17 & 18)

> "Children learn and learn only because they like their teacher and wish to please him. Children learn for the love of the teacher, so to speak. This is less so as the children grow older, but it never stops. It is hard to learn from a teacher you don't care for; impossible for a young child, I would say." (Id., p. 18)

The teacher cannot teach any subject unless a child accepts him, likes him, and admires him. Along with role modeling there exists role assimilation in which children assume and learn to assume an identity of their own formed by and incorporating part of the personality, conduct and values of adult models.

Schooling as seen by Dr. van den Haag is an effort to impart the selected cultural heritage of the society of which one is a part. This cultural transmission is a selective process. All the bad traits of a national character such as propensity for crimes of violence should be avoided and ideas of honesty, proper behavior and restraint or avoidance of certain sexual practices, including those the subject of the regulation, should be taught. (Id., p. 24)

Dr. van den Haag also highlighted the emphasis of the rule upon status and not morality. In practice, it would be impossible to regulate whether a prospective teacher had extra or premarital sex. On the other hand, the status of having an illegitimate child will be readily observable in a town such as Drew.

The rule clearly regulates the situation of an individual having an illegitimate child rather than the situation of an individual engaging in premarital sex. (Id., p. 30)

Addressing the issue of the supposed severability of teachers' conduct from students' values and inferentially their sexual practices, Dr. van den Haag commented:

> "The impact varies with the degree of like and admiration that the students have for the teacher. But the impact is invariably great in elementary grade schools and up to, I would say, junior high school. . . . There are, I think, numerous biographies and autobiographies of people who report on the impact that an admired teacher had on their own development and personality. I think that it is indisputable that when you have daily and intimate and extended contact with a person much older than you and you are very young and plastic, so to speak, that person will, whether he wants to or not, influence you and participate in the formation of your personality." (Id., pp. 45-46)

The vital center of Dr. van den Haag's testimony is that children are sent to school to learn useful and accepted patterns of society and to internalize them. "They internalize them not so much by what the teacher formally teaches but what he is and does in their relation to him."

Dr. Buchanan, presently Dean of the School of Education at Delta State University, who served in the capacities of principal, assistant principal and superintendent for over 22 years in school systems throughout Mississippi agreed with the other authorities, testifying that "teachers teach by concept and by example". (Tr., p. 32, May 31, 1973) Based upon his many years of working directly with teachers and students, he held to the view that: "In the formative years, in the beginning years, the elementary, * * * the teacher has more impact, more influence even than parents in many cases. And certainly as much in most cases. And most of all in many cases." (Id., pp. 32, 33) The sum of his testimony was that it would be very destructive to a school system not only as to the students but as to the other teachers and parents

to allow parents of illegitimate children to teach in the system.

Mrs. Ruby Nell Stancill, a teacher in the Drew school system for 22 years, testified that a teacher has a great responsibility in the moral and character development of school children since children desire to imitate their teachers. It was her opinion that a teacher's conduct and life style have a great influence upon the students. (Tr. 96-7, May 31, 1973) She expressed concern that it would be very difficult if not impossible to explain why an individual should not give birth to a child out of wedlock if one or more teachers in the district had so done. (Id., p. 101)

SUMMARY OF ARGUMENT

There is no right derived from or protected by the Constitution of the United States for unwed persons to bear illegitimate children. Therefore, the failure of defendants to employ instructional personnel based upon such status does not impinge upon a constitutional right.

The school district has a right and a duty to promulgate reasonable rules in regard to employment of instructional personnel to meet the special circumstance of the school district. The rule in question is constitutional and was so applied in this case.

The defendant school district, faced with the grave problem of an alarming rate of increase as to illegitimate births among its students, properly applied a rule which had been formulated based upon the distilled wisdom of educators and others possessing expertise in this field. It is beyond cavil that teachers and teacher aides who have wilfully committed certain illicit acts, which acts have

placed them into the status of unwed parents of illegitimate children, cannot function properly in their role as "educator, adviser, friend and, at times, parent-substitute." It is self-evident that such persons regardless of their present state of morality cannot serve as a proper "role model" for the children attending school in the Drew Municipal Separate School District. Again, we emphasize that the rule does not concern itself with the present status of morality of an individual but serves the office of protecting the students from being subjected to improper "role models" in their educational training. The Court is on judicial record that in certain areas of human involvement, appearance is sometimes exalted over substance. The Court with Mr. Justice Marshall as its organ announced that:

> "Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the *appearance* of bias." *Peters* v. *Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163. (Emphasis added)

If appearances rise to the dignity of constitutional recognition when an adult voluntarily or by fortune is placed in circumstances which may dictate his or her future for a finite period, can it be gainsaid that appearances (role models) are of even greater importance in circumstances of an individual during his or her formative years which dictate their entire future?

ARGUMENT

I.

The district court's finding that the defendants' failure to employ the plaintiffs was based upon a constitutionally impermissible reason, i.e., the bearing of illegitimate children, conflicts with the Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701, and Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694.

The district court lacked jurisdiction to consider these claims for employment. 28 U.S.C. Section 1343 requires the presence of a constitutional right. Where employment is denied or terminated, some protected interest in "liberty" or "property" rooted in the Constitution must be implicated to grant jurisdiction. *Board of Regents* v. *Roth*, supra. In the case of the new applicant, Andrews, there is no "right" to employment such as would confer jurisdiction; there is only a countervailing duty of the State not to infringe certain definable constitutional guarantees. Whatever actionable right to employment exists springs only from a constitutionally protected interest. Plaintiff Rogers, who was not rehired, has failed to allege the existence of any rules, tenure or understanding that "would justify any legitimate claim of entitlement to continued employment." *Perry* v. *Sindermann*, supra.

Both claims, if they lie, must rest on the asserted right to be free of barriers that penalize parents of illegitimate children. Is such status constitutionally protected? If it is, it rests on some penumbral First Amendment right to complete liberty of procreation. True enough, certain activities relating to marriage are in this zone of personal privacy, *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 93

S.Ct. 1409, but the Court has confined this constitutional right to sexual activity within the confines of marriage. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Again, the rights growing from childbirth are ". . . the right of the individual to marry, establish a home, and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1924). Plaintiffs have misread these cases and have in effect found a fundamental right to procreate outside marriage which does not exist. Where race is not a factor, states have a wide latitude in prohibiting illicit conduct, none of which could be characterized as constitutional. *McLaughlin* v. *Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Thus, this suit for employment must rise or fall on the existence of constitutional protection for the activity practiced. Unless this protection is present, the state may deny a benefit to a person without recourse.

Neither this Court nor any other court has ever placed its imprimatur upon the bearing of illegitimate children. Conversely, the Court has always recognized a sovereign's justified concern and interest in the sanctity, preservation and encouragement of marriage and has repeatedly upheld the sovereign's right to enact certain laws to that end, e.g., statutes dealing with bigamy, adultery, bastardy, etc.

Marriage is the very cornerstone of western civilization, and any element which might tend to erode this foundation is and should be of serious concern to all. The Chief Justice acknowledged for the Court in *Boddie* v. *Connecticut*, 401 U.S. 371, 374, 28 L.Ed.2d 113, 91 S.Ct. 780, "the basic position of the marriage relationship in this society's hierarchy of values."

This Court has long been on record that rules, regulations and policy which proscribe conduct which is inimical to the sanctity of marriage are not only constitutional but are praiseworthy. In a somewhat analogous case to the case sub judice the Court upheld an Act which denied the right to vote to any person who was in the "status" of a bigamist or polygamist. The Court opined that the Act did not proscribe the commission of the offense but rather the "status". The Court was of the opinion that Congress had the authority to constitutionally attack such "status" and reasoned that:

> "For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, selfgoverning commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this Act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment." *Murphy* v. *Ramsey*, 114 U.S. 15, 29 L.Ed. 47, 5 S.Ct. 747

Sounding the same moral note the Court in *Davis* v. *Beason*, 133 U.S. 333, 33 L.Ed. 637, 10 S.Ct. 299 admonished that such conduct:

> Tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade

> woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved purnishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community."

Murphy and *Davis* were cited by this Court as recently as June 24, 1974 in *Richardson* v. *Ramirez*, 418 U.S. 24, 41 L.Ed.2d 551, 94 S.Ct. 2655.

Although writing in dissent in *Boddie*, supra, no member of the Court disagreed with Mr. Justice Black's characterization of marriage:

> "It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages." 401 U.S. 390

Although the Court has never condemned the issue of illicit unions, it has in the past allowed a state law to stand against a constitutional attack, which law came down hard upon the illegitimate issue rather than the parents. *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017.

II.

The school district rule, neutral as to sex and race, does not violate the Due Process Clause and/or Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

There is perhaps no more basic precept of law than that the enactments of a legislative body are presumed to be valid. The burden of proving them invalid is a heavy one and rests squarely upon the plaintiffs in this case.

The Court in *F.H.A.* v. *Darlington*, 358 U.S. 84, 90, 91, 3 L.Ed.2d 132, 137, 79 S.Ct. 141, in addressing itself to the constitutional validity of a section of the National Housing Act, stated:

> "If we take as our starting point what the Court said in the Sinking Fund Case, 99 U.S. 700, 718, 25 L.Ed. 496, 501—'every possible presumption is in favor of the validity of a state statute, and this continues until the contrary is shown beyond a rational doubt.'—We do not see how it can be said that the 1954 Act is unconstitutional as applied."

The presumption of constitutionality of a statute is the postulate of constitutional adjudication. *New York* v. *O'Neill*, 359 U.S. 1, 3 L.Ed.2d 585, 79 S.Ct. 564.

In *Salsburg* v. *Maryland*, 346 U.S. 545, 550, 98 L.Ed. 281, 288, 74 S.Ct. 280, the Court announced that:

> "[W]e do not sit as a super legislature or a censor. 'To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" (cases cited omitted)

In *McGowan* v. *Maryland*, 366 U.S. 420, 425, 426, 6 L.Ed.2d 393, 399, 81 S.Ct. 1101, Mr. Chief Justice Warren, speaking for the Court, enunciated that:

> "[A]lthough no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Mr. Justice Black, speaking for the Court in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730, 10 L.Ed.2d 93, 97, 83 S.Ct. 1028, stated that "[w]e have returned to the original constitutional purpose that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Further, at 372 U.S. 732, we find the admonition that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."

The Chief Justice in his dissent in *Vlandis* v. *Kline*, 412 U.S. 441, 462, 37 L.Ed.2d 63, 77, 93 S.Ct. 2230, recognized that:

> "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as

to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred 'permanently and irrebuttably' from pursuing his calling without ever having an opportunity to prove his personal skills."

The rule in question serves a legitimate state interest and has a rational relationship to such interest and does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The Court announced in *Adler* v. *Board of Education*, 342 U.S. 485, 493, 96 L.Ed. 517, 524, 72 S.Ct. 380, that,

"[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps."

The above referred to duty and right of a school district was reaffirmed in *Beilan* v. *Board of Ed. of Phila.*, 357 U.S. 399, 2 L.Ed.2d 414, 78 S.Ct. 1317.

When the Court was again called upon to address itself to the right and duty of a state in regard to public education and the employment of teachers, admonished that "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize." *Shelton* v. *Tucker*, 364 U.S. 479, 485, 5 L.Ed.2d 231, 235, 81 S.Ct. 247. In support of this proposition, the Court cited *Adler* v. *Board of Education*, supra. Continuing, Mr. Justice Stewart, speaking for the Court, affirmed the proposition announced in *Beilan*, supra, that there is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."

Although the Court in *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, upheld a teacher's right to criticize the school board (a First Amendment right not present in the action sub judice) in *CSC* v. *Letter Carriers*, 413 U.S. 548, 564, 37 L.Ed.2d 796, 808, 93 S.Ct. 2880, Mr. Justice White, speaking for the majority, recognized that *Pickering* stands for the proposition that "the government has an interest in regulating the conduct" of its employees significantly different from those it possesses in connection with the citizenry in general.

Mr. Justice Powell in his concurring opinion in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 656, 39 L.Ed.2d 52, 69, 94 S.Ct. 791, recognized that

"[s]chool boards, confronted with sensitive and widely variable problems of public education, must be accorded latitude in the operation of school systems and in the adoption of rules and regulations of general application."

We submit to the Court that the rule promulgated by the Drew Municipal Separate School District does not operate against the present moral status of an individual school teacher or teacher aide, but operates against the example which such a teacher or teacher aide provides the students in the said school district. Both the district court and the court of appeals have opted for the position that an individual who seeks employment with the defendant school district should be given a due process hearing to determine whether or not his or her status as an unwed parent of illegitimate children would materially interfere with the educational processes of the school district. We suggest to the Court that such a hearing in and of itself would cause material disruption of the said educational processes and would avail little since it is not the present moral character of the individual that is in question but the individual's role in regard to the students attending school in the defendant school district. Mr. Justice Powell in his dissenting opinion in *Goss* v. *Lopez*, 419 U.S. 565 [No. 73-898], decided January 22, 1975, joined in by the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist, properly stated the role of a teacher when he stated that:

> "The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education."

He further acknowledged that a teacher must occupy many roles, such as "educator, adviser, friend and, at times, parent-substitute." Although speaking in another context, Mr. Justice Powell's recognition that "[w]e have relied for generations upon the experience, good faith and

dedication of those who staff our public schools" is equally applicable to the situation now before the Court.

This Court acknowledged in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, that public schools are the "principal instrument[s] in awakening the child to cultural values." 347 U.S. 493. While this acknowledgement was of importance then, it is of greater moment today as recognized by Mr. Justice Powell in *Goss*, supra:

> "In an age where the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools."

The beliefs of at least two of plaintiffs' experts are at total war with this universally recognized principle. Since such fallacious beliefs underpin their expert conclusions, such conclusions are of little value.

Dr. Edmund Gordon testified that while schools have an influence on the development of specific academic skills, they "tend to have relatively little impact on the so-called moral development of youngsters." (Dep.—Gordon, p. 25) It is interesting to note and also somewhat disturbing that Dr. Gordon is wed to the philosophy that in the selection of teachers he:

> "would probably shy away from the person who has completely abstained from sexual behavior, because, again in our society that is so atypical a pattern of behavior as to suggest some possible personal problem —less so, I would say, than a person who happens to have become pregnant possibly by accident out of expression of normal aspect of behavior." (Id., p. 26)

Adhering to this minority view, plaintiffs' witness, Ronald Samuda, added that "we have negligible effect when we attempt to teach values directly in the classroom." (Tr., p. 8—March 19, 1973—Samuda) His testimony is further discredited by his irresponsible statement, unsupported by any evidence, that "a great majority of the practicing teachers throughout the country * * * have participated in extramarital sex." (Id., p. 5)

Without even pausing for reflection upon such an all-condemning declaration, he plunged ahead as judge and jury and convicted the entire student body of Stanford University and three other unnamed universities of engaging in "premarital sex." (Id., p. 25)

Samuda's testimony and own moral values were summed up in one short answer when he emphatically admitted that he "believed in situation ethics." (Id., p. 22) The only concession that the witness made to the moral values which prevail in this country today is that when asked about the advisability of including homosexuals in teaching positions, in schools, he said he would like to think about that before forming an opinion. (Id., p. 34)

This constitutionally unassailable principle comes into even sharper focus when viewed in the light of the factual situation of the Drew School District. The total student enrollment for the district is 1,200. During the school year 1971-72 there were 28 schoolgirl pregnancies (Tr., p. 8, March 16, 1973, Pettey) reported in the age group of 13 to 17 years. It takes little knowledge of arithmetic to figure that this is approximately 10% of the number of schoolgirls of childbearing age in this school district.[6]

6. Approximately one-half of the school population (600) is female and approximately one-half of the group is of childbearing age (300).

This alarming rate of illegitimacy, coupled with the 35.2% of illegitimate births in Sunflower County (1971)[7] is more than ample support for this rule. (Pls. Exhibit #3) Armed with these figures, school administrators would be derelict in their duties not to fashion some type of policy to attempt to arrest this rising threat to the overall moral values of the community.

The Court of Appeals was of the opinion that there was no evidence in the record, other than speculation and assertions of opinion, to support the contention that the presence of parents of illegitimate children in a scholastic environment contributes to schoolgirl pregnancies. Although we submit that the statistics plus the opinions of school personnel and educational experts (including plaintiffs' witnesses) support such contention, the Court is on the record that the school district carries no such burden.

This Court in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-63, 37 L.Ed.2d 446, 93 S.Ct. 2628, the Chief Justice, writing for the Court, stated:

> "But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. (Footnote

7. The rule in question will not only help to decrease the illegitimate births among the school population but will have an impact upon the overall future county statistics by feeding into the population adults who have been taught to disfavor bearing children out of wedlock.

omitted) Mr. Justice Brennan, speaking for the Court in Ginsberg v. New York, 390 U.S. 629, 642-643, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968), said: "We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110, [55 L.Ed. 112, 31 S.Ct. 186]." Although there is no conclusive proof of a connection between antisocial behavior [413 U.S. 61] and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicity accepted that a legislature could legitimately act on such a conclusion to protect *"the social interest in order and morality."* Roth v. United States, 354 U.S., at 485, 1 L.Ed.2d 1498, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 86 L.Ed. 1031, 62 S.Ct. 766 (1942). (Footnote omitted).

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. (Cited cases omitted) 413 U.S. 60, 61.

* * *

The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional. 413 U.S. 62.

If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v. Allen, 392 U.S. 236, 245, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968), and Johnson v. New York State Education Depart., 449 F.2d 871, 882-883 (C.A.2 1971) (dissenting opinion), vacated and remanded to consider mootness, 409 U.S. 75, 34 L.Ed.2d 290, 93

S.Ct. 259 (1972), id., at 76-77, 34 L.Ed.2d 290 (Marshall, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." American Power & Light Co., supra, at 103, 91 L.Ed. 103. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." Steward Machine Co. v. Davis, 301 U.S. 548, 590, 81 L.Ed. 1279, 57 S.Ct. 883, 109 A.L.R. 1293 (1937). The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. 413 U.S. 63."

The District Court and the Court of Appeals condemn the rule in question on the ground that such rule does not allow for the "innocent"[8] parents of illegitimate children who may not serve as an improper "role model." Rules

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8. Several of the examples listed by the lower courts as "innocent" are themselves "suspect" classifications; i.e., premarital sex; sexual relations while under the influence of drugs or alcohol; sex by deceptive design; sexual neophyte. Although these examples may support a plea for compassion, they do not undercut the school district's authority to adopt a rule which serves a legitimate educational end.

and regulations that may in practice not be perfect but which serve a valid state interest rather than being condemned have been approved as constitutional by this Court. In *Weinberger* v. *Salfi*, No. 74-214, ... U.S. ....., 45 L.Ed.2d 522, 95 S.Ct. 2457, this Court recognized that a rule which denied social security benefits to a surviving wife or a stepchild who had their respective relationships to a deceased wage earner for less than nine months prior to his death "undoubtedly excludes some surviving wives who married with no anticipation of shortly becoming widows." The Court further was of the opinion that "it likewise may be true that the requirement does not filter out every such claimant" because of certain circumstances while acknowledging that the regulation may cut against and exclude widows who were truly "innocent" of any wrongdoing or sham arrangements. Even so this Court declared the regulation to be constitutional.

Striking this same judicial chord, the United States Circuit Court of Appeals for the Eighth Circuit upheld as constitutional a school district policy that prohibited employment of a husband and wife in an administrative-teacher relationship. *Keckeisen* v. *Independent School District*, 509 F.2d 1062, cert. denied, 44 U.S.L.W. 3194 (Oct. 6, 1975). The policy was formulated on the assumption that such a husband-wife relationship may cause in the future a conflict of interest and further may create a morale problem among the other teachers. Although there was no proof that the relationship of the plaintiff, principal of the school, and his wife, a teacher at the same school, caused any problems and in fact the proof was to the contrary the Court opined that where "possibilities of conflicts of interest exist, the Board should [not] be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take action." p. 1066. The Court further was

of the opinion that such a regulation did not impinge upon the plaintiff's right to marry. In answer to the plaintiff's contention that the regulation includes couples who may not have a conflict of interest, the Court answered:

> "We have no doubt that in many cases where husbands and wives are employed in supervisor-supervisee capacities, the married couple make an exemplary effort to maintain fairness, but we cannot say a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary, or capricious." p. 1066.

We suggest to the Court that the case law, expert testimony presented at trial, common experiences and just plain common sense underpin rather than undermine the policy of the Drew Municipal School District. Viewed in light of the facts that exist in the school district and the county as to the high rate of illegitimate births, the questioned policy is not only reasonable but compelling. Such a policy is necessary to vouchsafe for the school children of Drew teachers to whom they may look not only for cognitive knowledge but as "adviser, friend and, at times, parent-substitute." How can it be seriously gainsaid that the questioned policy serves a legitimate school interest which meets all constitutional commands.

Plaintiffs attempt to counter defendants' argument by asserting that the act of giving birth to an illegitimate child is not in conflict with the moral values of the legal community. After plaintiffs' attorney advised the Witness Gordon that in 1971 in Sunflower County, Mississippi, where the Drew School District is located, 44.6% of the live, non-white births were illegitimate he stated in effect that it was therefore his opinion that the bearing

of illegitimate children was not contra to the moral values of the local non-white community. (Dep. Gordon, p. 28)

The witness further opined that there exist in the local community two separate and different cultures; i.e., a white culture with its own moral values and lifestyle, and a non-white culture with its own moral values and lifestyle. (Dep. Gordon, pp. 29-30, May 29, 1973) When questioned about the school policy as to parents of illegitimates, he stated that "to try to impose the same standard on both cultures, now I think, is not only incorrect but discriminatory." (Id., p. 30) In further recognition of his beliefs, he condemned the school district for its efforts to arrest this alarming rate of illegitimate births by announcing:

> "In this particular instance I am suggesting that in a society where a particular pattern of behavior is the norm, to rule that pattern of behavior out as illegal, unacceptable, discriminates against the cultural group that practices that behavior." (Id., p. 33)

In a further attempt by the plaintiffs to establish that giving birth to an illegitimate child is not against the moral values of the local non-white community, they presented the testimony of Ms. Mae Bertha Carter, a black citizen of the Town of Drew to the effect that "morals have nothing to do with an unwed mother" having an illegitimate child. (Tr., p. 18—May 31, 1973) The witness readily admitted that she had a "child that was the parent of an illegitimate child." (Id., p. 19) Even though the witness held to these beliefs, she admitted on cross-examination that the Drew Public Schools had a problem with unwed schoolgirl pregnancies. (Id., pp. 19-20)

In furtherance of this position, plaintiffs called as a witness Ms. Hamer, a black citizen of Sunflower County,

who testified that the actions of these plaintiffs and their conduct in regard to bearing illegitimate children "as per the black community are quite moral." (Tr., p. 91—March 20, 1973)

Pressing forward with this same point the plaintiffs offered the testimony of Violet Burnett, a black citizen of the community, who is an unwed parent of an illegitimate child and had previously been employed with the Drew School District. The tenor of her testimony is reflected from the following colloquy:

> Q Well, do you feel that it would be wrong for any of the students at the Drew High School to engage in sexual intercourse?
>
> THE WITNESS:
>
> I feel like if that's what they want, they can do it. That's just the way I feel.
>
> MR. TERNEY:
>
> Q In other words, if you were teaching at Drew and some school girl came up to you, 13, 14, 15 years old, and she looked up to you as a teacher and asked you, said she really had a big problem, she wanted to discuss it with you, she wanted to have sexual intercourse with her boyfriend, you would tell her, "It's all right, go right ahead"?
>
> A I would tell her if that's what she wanted and she felt like that's what she wanted to do, go right ahead. (Tr., p. 32—March 20, 1973)

The plaintiff Rogers was questioned about her moral beliefs in this regard and such is documented by the following:

Q Now, what is your feeling about the moral issue? Is it right or wrong for you or for any individual to have sexual intercourse and not be married?

A Well, I can't say it's right and I can't say it's wrong. Because I think it's left up to you as long as you are not hurting anyone else. I think you should do whatever you feel is right.

Q Do you intend to have any more children?

A I don't know.

Q. Haven't decided?

A No.

Q But you may have more children, even though you are not married?

A I don't know. (Tr., p. 43, March 20, 1973)

The moral values of the plaintiff Andrews have been previously indicated by her testimony concerning the falsification of her application and her testimony as to the moral aspect of having illegitimate children is substantially the same as that of the plaintiff Rogers. (Tr., pp. 60 & 64 & 67, March 20, 1973)

It is somewhat ironical that in the year 1975 plaintiffs who are members of the class which sued this school district to bring about total integration are now in all practicality asking this Court to turn back the clock and to recognize and treat the populace of the Drew school district as two separate and distinct cultural groups. Not only was this a surprise to the defendants but the district judge after hearing certain testimony was prompted to ask the witness if he was of the opinion that the "Supreme Court was wrong in Brown versus Board of Education in ordering integration of education." (Tr., p. 11, March 19, 1973)

Because this interpretation of the testimony may appear incredulous we set out the following for the benefit of the Court:

> Q Let me ask you this question. In terms of the rule itself there has been testimony to the effect that the rule was created in order to create a proper image for black children. Is it possible to infer that this rule, in fact, is detrimental to the best interests of black children in a situation where a majority or a large number of those children, say a third or more, a large number of those children come from homes with a matriarch or come from homes which have an unwed parent?
>
> A Well, as a matter of fact, I think that to infer that a teacher must be a middle class person could almost be psychologically detrimental to black children. Because what you are really doing is introducing a foreign, an alien value system. There are differences between the value system of black children and that of white children, and these have historical antecedents. It is based upon the fact of slavery. Where does the matriarchal society come from? Why? Is it a natural and ordinary, an African thing? In my opinion, it is not. Africans have a very, very strict code of morals. What has occurred in the interim is that as a result of slavery the male slaves were deliberately taken away from the family, and this was done in order to prevent unity. And also, the tribal groups were broken up, the family was broken up and males were deliberately removed from the family so that there would not be rebellion. This was understandable because slavery was a fact. Now, this historical fact, in my opinion, is the reason why you have a sort of matriarchal tendency within the black community.

Now, the point I am trying to make is that there is a kind of value system within the black community, there is another kind of value system within the middle class white community. And these are different. And when you place a white Anglo-Saxon, Protestant, upper middle class person in a classroom to teach black children, you have conflicting values. And, in fact, I think that you would tend to produce an even more psychologically damaging effect than if you have this divergence of class structure.

Q Hence the real effect of this rule, in essence, to black children is indeed a very damaging one in terms of their personal psychologies?

A In my opinion, to introduce strange and alien values into a classroom is detrimental.

THE COURT:

Do you think, then, the Supreme Court was wrong in Brown versus Board of Education in ordering integration of education?

THE WITNESS:

No, I wouldn't go so far as to say that, Your Honor. What I am trying to say is that we need to look at the way in which we are going to organize education in view of the fact that we have tried to be fair. But it's not a simple matter. I don't think we can just suddenly say, "All right, let's put a lot of white teachers into black classrooms and then we can produce this kind of culture." It's not going to happen that way. The black people are a special kind of people. They are almost like a foreign people. I happen to have been born, for example, in Jamaica. There are differences between my value structure and the value structure of my colleagues who are white

Americans. This is what I am saying. That there are differences in value and that we must be cognizant of these and, in fact, to attempt to introduce new values can be psychologically damaging to these children. (Tr., pp. 9-12, March 19, 1973)

Q Are you familiar with the moral values in this section of the country, of the United States?

A I believe so.

Q And you have told the Court that in your opinion the black race holds different moral values and standards than the white race?

A Different values. A different set of values, a different set of psychological conditions. And that these psychological conditions have been determined by the historical antecedents of each particular group of people. And that there is a different value system within the white middle class community as opposed to the black community, because the black community has suffered many hundreds of years of slavery. (Id., p. 23)

MR. TERNEY:

Q Your testimony today, then, Doctor, is to the effect that in minority groups, and particularly in the black race, that in the home that there is a need for a strong dominate parent figure outside of the home that does not exist in the home, is that correct?

A Not necessarily. This is a presumption that has been made. The point that I have been making is this. There are many unscientific and untested hypotheses about the behavior of people. And that we tend to assume that it must be right simply because it is right and it is a part of the Anglo-Saxon, Protes-

tant ethic. And the Anglo-Saxon Protestant system happens to be one kind of system, which is not necsarily true for all people.

Q. Then, Doctor, do you feel it would be educationally sound, more sound than the situation we have now, for the school districts to employ black teachers for black classrooms?

A (No response)

Q Rather than a white teacher over a black classroom?

A In my opinion, it would be sound if—given two situations. And assuming that I were the superintendent of a district and I had two people of equal qualifications and where I had a predominantly black classroom and you were asking me which of these two people would I employ, in my opinion, I would tend to employ the black person. Because that is one other way of producing the kind of climate and the kind of affinity that is necessary for a good psychological atmosphere. (Id., pp. 28-29)

Plaintiffs have set sail upon a collision course with prior decisions of this Court. The Court after years of navigating through troubled waters has anchored in what it has considered to be a safe harbor. Acknowledging that it has not tied itself to the dock and still has room to drift when necessary to accommodate special circumstances we have serious doubts that the Court will veer from the beacon that no group has a constitutional right to preferential treatment based soley on race. We do not believe that this Court will say to the Drew School District—"you must recognize two cultures in your community and accommodate them both". No man can serve two masters. Since this is an impossible mandate for this small rural

school district to follow, such a command, in effect, would require these defendants to teach an alien doctrine to all, both Black and White, that marriage and family were no longer the cornerstone of this great nation but that such had been replaced by "a number of cultures inside the United States * * * where formal marriage is not so much the pattern but any variety of liaisons". (Dep. Gordon, p. 29)

We urge the Court not to strike down a policy promulgated for a laudable purpose and in no way impinges upon the constitutional rights of these plaintiffs. The Court has always allowed latitude to the executive and administrative bodies in determining the qualifications of their employees. It has long been recognized by courts:

> "That some human infirmities are beyond the control of the applicant may be unfortunate but it does not undermine the power of the Executive to hire only those whose employment will 'best promote the efficiency' of the public service." *Scott* v. *Macy*, 402 F.2d 644, 652 (Burger, Circuit Judge, dissent).

If this policy, born of necessity and reared in great hope and expectation, can not survive the strictures of the constitution then we hold faint hope for school administrators to fulfill their appointed role as guardians of the educational processes of this nation. The demise of this policy will cause irreparable damage to this small rural school district and retard if not completely destroy its efforts to "shape the attitude of young minds towards the society in which they live".

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, Petitioners urge the Court to declare the policy in question to be constitutional and allow this small rural school district to continue to carry out its function —education "perhaps the most important function of state and local governments".

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